WJCHAI ONPROM

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CRIMINAL APPEAL NO. K-05-20-1995]
10 JULY 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in dangerous drug - Appeal against conviction and sentence - Whether evidence of chemist unsatisfactory and suspect - Prima facie proof of actual trafficking - Finding of fact of trial judge – Whether conviction of appellant on charge safe*

EVIDENCE: *Expert evidence - Chemist - Whether evidence unsatisfactory and suspect - Whether chemist unsure whether leaves in question were cannabis or marijuana - Whether prosecution failed to prove beyond reasonable doubt that leaves were cannabis - Dangerous Drugs Act 1952, s. 39B(2)*

The appellant, who was charged, tried and convicted of an offence of trafficking under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act'), challenged the conviction on the ground that the evidence of the chemist ('PW3') was unsatisfactory and suspect. It was submitted that PW3 was unsure whether the leaves in question were cannabis or marijuana and it was further submitted that the prosecution, on the basis of PW3's evidence, had failed to prove beyond a reasonable doubt that the leaves were cannabis.

Held (dismissing the appeal, and affirming the conviction and sentence)
Per Gopal Sri Ram JCA:

(1) The learned deputy demonstrated that PW3 had not said that Indian hemp and cannabis was the same thing. All that PW3 had said was that as far as he was concerned the two terms were synonymous. The learned trial judge accepted PW3's evidence and found the drug in question to be cannabis. Having carefully considered the whole of PW3's evidence, this

court was satisfied that the prosecution had established beyond a reasonable doubt that the leaves were cannabis. That was all that the law required. Accordingly, the learned judge did not misdirect himself on this part of the case. (para 3)

(2) In his judgment the learned judge, after a careful summary of the evidence, correctly took the view that on the facts established it was not necessary for the prosecution to rely on the presumption under s. 37(da)(iv) of the Act since this was a case of actual trafficking. The appellant was caught conveying a very large quantity of cannabis from Thailand to Malaysia. In view of the amount involved, it was safe to infer that the drug was intended for a third person or persons, known or unknown. So this was not a case of mere passive possession. There were overt acts done by the appellant, namely the active concealment of the drug on his person followed by its conveyance from Thailand into Malaysia which reasonably supported the existence of criminal purpose proscribed by the Act. The very same facts also gave rise to a strong inference that the appellant was aware of his possession, knew the nature of the drug possessed and had the power of disposal over it. So much for the *prima facie* proof of actual trafficking. (paras 4 & 11)

(3) The learned judge, after a careful consideration of the appellant's unsworn statement denying any knowledge of the contents of the packages, held that it did not raise a reasonable doubt in his mind. In short, he rejected the assertion of lack of knowledge. This was a finding of fact based on credibility and was a matter on which this court, as an appellate court, must defer to the views of the learned judge. (para 12)

(4) Having read and re-read the record of appeal, this court was satisfied that no miscarriage of justice was occasioned in this case. Any reasonable tribunal armed with the facts presented to the court in this case would have come to the conclusion at which the learned judge arrived at in this case. The conviction of the appellant on that charge was accordingly safe. (para 13)

Bahasa Malaysia *translation of headnotes*

Perayu, yang dituduh, dibicara dan sabitkan atas kesalahan mengedar dadah di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('Akta'), telah mencabar sabitan atas alasan bahawa keterangan ahli kimia ('SP3') adalah meragukan dan tidak memuaskan. Ianya dihujahkan bahawa SP3 tidak pasti sama ada daun-daun yang berkenaan merupakan cannabis atau marijuana. Dihujahkan seterusnya bahawa, berasaskan keterangan SP3 tersebut, pendakwaan gagal membuktikan di luar keraguan munasabah bahawa daun-daun adalah cannabis.

Diputuskan (menolak rayuan, mengesahkan sabitan dan hukuman)
Oleh Gopal Sri Ram HMR:

(1) Yang arif timbalan telah menjelaskan bahawa SP3 tidak berkata bahawa Indian hemp dan cannabis adalah benda yang sama. Apa yang dikatakan oleh SP3 hanyalah bahawa kepada beliau kedua-dua terma tersebut adalah sinonim. Yang arif hakim menerima keterangan SP3 dan mendapati dadah berkenaan adalah cannabis. Setelah menimbang dengan teliti keseluruhan keterangan SP3, mahkamah ini berpuas hati bahawa pendakwaan telah membuktikan di luar keraguan munasabah bahawa daun-daun adalah cannabis. Hanya ini yang dikehendaki oleh undang-undang. Yang arif hakim, dengan itu, tidak tersalah arah akan dirinya berhubung soal ini.

(2) Dalam penghakimannya, yang arif hakim telah memperhalusi keterangan dan telah mencapai rumusan yang betul bahawa atas fakta-fakta yang dibuktikan adalah tidak perlu bagi pendakwaan untuk bergantung kepada s. 37(da)(iv) Akta disebabkan kes adalah kes pengedaran sebenar. Perayu didapati membawa cannabis dalam jumlah yang besar dari Thailand ke Malaysia. Mengambilkira jumlah besar tersebut, adalah wajar untuk menganggap bahawa dadah adalah untuk orang atau orang-orang ketiga sama ada diketahui atau tidak diketahui. Jadi ini bukan suatu kes milikan pasif semata-mata. Ia adalah perbuatan perayu yang dilakukan tanpa selindung, iaitu dengan sengaja menyorokkan dadah pada badannya diikuti dengan membawanya dari Thailand ke Malaysia, sekaligus menzahirkan perlakuan jenayah yang dilarang Akta. Fakta-fakta ini juga telah membangkitkan anggapan kukuh bahawa perayu

A sedar akan apa yang dibawanya, tahu sifat dadah yang dibawanya dan mempunyai kawalan terhadap pelupusannya. Maka itu, wujud bukti *prima facie* tentang pengedaran sebenar.

(3) Yang arif hakim, setelah menimbang dengan teliti kenyataan
B tidak bersumpah perayu yang menyangkal sebarang pengetahuan terhadap kandungan bungkusan, merumuskan bahawa ia tidak membangkitkan keraguan munasabah di fikirannya. Dengan lain perkataan, beliau menolak alasan ketiadaan pengetahuan. Ini adalah satu dapatan fakta yang
C didasarkan kepada kredibiliti. Oleh itu, ia adalah perkara yang mahkamah semasa, sebagai mahkamah rayuan, semestinya menyebelahi pandangan yang arif hakim.

(4) Setelah berkali-kali membaca rekod rayuan, mahkamah ini berpuas hati bahawa tidak berlaku salah laksana keadilan dalam
D kes ini. Mana-mana tribunal munasabah pun, dengan berbekalkan fakta-fakta yang dikemukakan dalam kes ini, akan mencapai keputusan yang sama seperti yang dicapai oleh yang arif hakim. Dengan itu, sabitan perayu atas pertuduhan adalah teratur.
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Case(s) referred to:
Abdullah Yaacob v. PP [1991] 2 CLJ 853; [1991] 1 CLJ (Rep) 5 ***(refd)***
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
F *Kesavan v. PP [2003] 1 CLJ 846 CA* ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 HC ***(refd)***
G *PP v. Nik Ahmad Aman [2002] 6 CLJ 369 HC* ***(refd)***
Saad Ibrahim v. PP [1968] 1 MLJ 158 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(da), 39B(2)

H *For the appellant - A Pancharam; M/s Mayandi & Panjaram*
For the respondent - Roslan Mat Noor

[Appeal from High Court, Alor Setar; Criminal Trial No: 45-15-1994]

Reported by Suresh Nathan
I

JUDGMENT

Gopal Sri Ram JCA:

[1] The appellant was charged, tried and convicted of an offence of trafficking under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act"). He received the mandatory death sentence.

[2] The facts are these. On 24 February 1994, at about 2.45pm, PW4 (Corporal Mohd Fuad bin Jaafar) and five other police personnel were on duty at the check point at the Immigration Complex at Bukit Kayu Hitam. The appellant, a Thai national came to the check point. He was on foot. He had a Thai passport and was seeking to enter Malaysia. He was not carrying anything in his hands. He wore a jacket. PW4 then searched the appellant. This initial search yielded results. A small packet was found in the left pocket of the appellant's jacket. It contained dried leaves which PW4 suspected to be cannabis. The appellant was then taken to the police booth where a second search of his person was conducted. The appellant was found to be wearing three layers of clothing. This second search also yielded results. Two other packets were found. They were attached by cello tape to the appellant's 'T' shirt. These two packets also contained dried leaves. Subsequent examination by the Government chemist revealed that the packets found on the accused's person contained 1,214 gm of cannabis. The appellant was, as we have already said, charged with trafficking this proscribed drug and convicted of that offence.

[3] Before us, the conviction was challenged on the ground that the evidence of the chemist (PW3) was unsatisfactory and suspect. It was submitted that PW3 was unsure whether the leaves in question were cannabis or marijuana. It was further submitted that the prosecution, on the basis of PW3's evidence had failed to prove beyond a reasonable doubt that the leaves were cannabis. In his response, the learned deputy took us through PW3's evidence in some depth and demonstrated that this witness had not said that Indian hemp and cannabis was the same thing. All that PW3 had said was that as far as he was concerned the two terms were synonymous. The learned judge accepted the chemist's evidence and found the drug in question to be cannabis.

Having carefully considered the whole of PW3's evidence we were satisfied the prosecution had established beyond a reasonable doubt that the leaves were cannabis. That is all that the law requires. See, *Abdullah bin Yaacob v. Public Prosecutor* [1991] 2 MLJ 237; *Kesavan v. Public Prosecutor* [2003] 1 CLJ 846. Accordingly we are satisfied that the learned judge did not misdirect himself on this part of the case.

[4] Although the appeal was confined to the attack on the chemist's evidence, we took the precaution of carefully scrutinising the evidence on record and the judgment of the learned judge to ensure that the appellant's conviction was safe. In his judgment the learned trial judge, after a careful summary of the evidence correctly took the view that on the facts established it was not necessary for the prosecution to rely on the presumption under s. 37(da)(vi) as this was a case of actual trafficking. There is however an observation we would make on a point of some importance.

[5] Hearkening to fundamentals, it is a requirement of essential justice that an accused should be made aware at the earliest opportunity of the nature of the case he has to meet. In the case of a charge of trafficking, there is a wide range of options open to the prosecution to present its case. It may seek to make out a case of actual trafficking. Or it may seek to rely on one or more of the presumptions in s. 37(da) of the Act to raise a case of trafficking. But the court and the accused must be informed at the earliest possible stage as to which option the prosecution seeks to pursue. This will assist the court to focus on the relevant evidence and enable the defence to direct its cross examination on the material points. We would in this context mention the very recent decision of the Federal Court in *Public Prosecutor v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 where the following observation was made:

> Trial judges and defence counsel are most often left guessing until the very end of the trial as to whether the prosecution is relying on direct evidence to prove trafficking or whether they seek to rely on the presumption under s. 37(d) or s. 37(da) of the Act.

[39] In our view, the problem is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking or if it intends to rely on a presumption to establish trafficking and, if the latter be the case, to identify the precise presumption. This could be done either before the commencement of the trial or as part of the opening speech and would go a long way in assisting the defence in directing its cross examination along appropriate lines and thereby avoiding a waste of the court's time. See, *Public Prosecutor v. Chia Leong Foo* [2000] 4 CLJ 649, applying *Public Prosecutor v. Okonkwo & Anor* [1993] 3 SLR 610.

[6] In the present case, the statement of facts tendered by the prosecution *in lieu* of the usual opening statement makes no reference as to whether the prosecution is relying on evidence of actual trafficking or relying upon the presumption under s. 37(da) of the Act. The very first time you find mention of it is in the prosecution's submission at the close of its case. We emphasise that it is contrary to the principles of essential criminal justice to permit the prosecution to meander at will and then, at some point convenient to it, to try and pigeonhole the facts adduced into one or more of the provisions in the Act. If in an appropriate case such a course occasions a miscarriage of justice this court will have no choice but to intervene and quash the conviction as being unsafe. However, in the instant case it is fortunate that the appellant did not suffer any prejudice through this failure on the part of the prosecution. For it is clear from the notes of evidence recorded by the learned judge, that counsel for the appellant at the trial focussed on the relevant issues and does not appear to have been disadvantaged by prosecution's failure to observe the rule of disclosure.

[7] Because of the way in which the case was tried and argued in the court below, we think it apposite to re-state the law on the subject of actual trafficking of drugs. In a case where the prosecution is relying on evidence of possession to prove actual trafficking by having resort to the definition in s. 2, such possession must be accompanied by some overt act on the part of the accused to be able to constitute trafficking. See, *Public Prosecutor v. Hairul Din bin Zainal Abidin* [2001] 6 CLJ 480; *Public Prosecutor v. Nik Ahmad Aman* [2002] 6 CLJ 369; *Mohamad Yazri*

bin Minhat v. Public Prosecutor [2003] 2 CLJ 65. In other words, mere passive possession is insufficient to establish a case of actual trafficking.

[8] Where the prosecution relies on possession accompanied by some overt act on the part of the accused as constituting the offence of trafficking, the court is concerned with two questions. First, whether the accused had *mens rea* possession of the proscribed drug. This is because the word "possession" appearing in ss. 2 and 37(da) of the Act does not connote mere physical possession. Second, the purpose for which he had the proscribed drug in his possession. Although in most, if not all cases, the evidence presented to the court is common to both questions it is nevertheless important to address the two questions.

[9] Take the first question. In *Saad Ibrahim v. Public Prosecutor* [1968] 1 MLJ 158 at p 159, Yong J explained what is meant by "*mens rea* possession":

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

This test of *mens rea* possession has been repeatedly applied by our courts, and very recently by the Federal Court in *Public Prosecutor v. Mohd Radzi Abu Bakar.*

[10] Now take the second question. The court must take a commonsense approach when deciding the accused's purpose in having the drug in his or her possession. This is essentially a question of fact to be inferred from the surrounding circumstances. In *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64, Lord Diplock when commenting of the equipollent provisions of the Singapore Misuse of Drugs Act 1973 made observations which our courts have held apply with equal force here. See, *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469; *Looi Kow Chai & Anor v. Public Prosecutor* [2003] 1 CLJ 734. When referring to the definition of "trafficking" in the Singapore Act, Lord Diplock said:

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of sections 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. *Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption* such as is contained in section 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that section 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under section 15. In the instant cases, however, the quantities involved were respectively one hundred times and six hundred times the statutory minimum.

> Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3. (emphasis added.)

[11] Now, adopt a similar approach to the present case. Here the appellant was caught conveying a very large quantity of cannabis from Thailand to Malaysia. In view of the amount involved, it is safe to infer that the drug was intended for a third person or persons, known or unknown. That other person or persons may, to borrow Lord Diplock's words, be "the actual consumer or a distributor or another dealer". So this is not a case of mere passive possession. There were overt acts done by the appellant, namely the active concealment of the drug on his person followed by its conveyance from Thailand into Malaysia which reasonably supports the existence of criminal purpose proscribed by the Act. We may add that the very same facts also give rise to a strong inference that the appellant was aware of his possession, knew the nature of the drug possessed and had the power of disposal over it. So much for the *prima facie* proof of actual trafficking.

[12] In his unsworn statement from the dock the appellant sought to rebut the inference raised by the prosecution's evidence. He denied any knowledge of the contents of the packages. So the issue of fact that the learned judge had to decide was whether the appellant knew of the contents of the packages. The learned judge after a careful consideration of the appellant's unsworn statement held that it did not raise a reasonable doubt in his mind. In short, he rejected the assertion of lack of knowledge. This is a finding of fact based on credibility and is a matter on which we as an appellate court must defer to the views of the learned judge. See, *Andy bin Bagindah v. Public Prosecutor* [2000] 3 CLJ 289.

[13] Having read and re-read the record of appeal we are satisfied that no miscarriage of justice was occasioned in this case. In our judgment any reasonable tribunal armed with the facts

presented to the court in this case would have come to the conclusion at which the judge arrived at in this case. The conviction of the appellant on that charge is accordingly safe.

[14] For the reasons already given the appeal was dismissed and the conviction and sentence affirmed.